

No. 11625

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

ESTATE OF BELLE ALICE HAMBURGER NATHAN, EVELYN
HAMBURGER, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

OCT 15 1947

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CLERK

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OPINION BELOW

The unreported memorandum opinion of the Tax Court appears at pp. 54-60 of the Record.

JURISDICTION

This petition for review (R. 477-491) involves federal estate tax in the amount of \$47,543.61 (R. 68). Notice of deficiency was mailed the petitioner by the Commissioner of Internal Revenue on December 27, 1943 (R. 10-11); and within ninety days thereafter, on February 9, 1944, petitioner filed a petition with the Tax Court for a redetermination of that deficiency un-

der the provisions of Section 272 of the Internal Revenue Code (R. 5-17). The decision of the Tax Court (R. 67-68) was entered December 31, 1946 (R. 68). The case is brought to this Court by a petition for review filed March 25, 1947 (R. 491), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the Tax Court erred in determining that for estate tax purposes the stock of A. Hamburger & Sons, Inc., had a value of \$1,000 per share, and that of Hamburger Realty Company, \$3,900 per share.

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*.

STATEMENT

The facts, taken from the Tax Court's memorandum findings (R. 36-53) are as follows:

Belle Alice Hamburger Nathan died on October 13, 1940. (R. 36.)

Her executors elected to have the assets of her estate valued on the optional date of October 13, 1941. (R. 36.)

The petitioners¹ filed a federal estate tax return on Form 706 with the Collector of Internal Revenue, Sixth District of California, and paid the tax provided therein. (R. 36.)

¹ Under motion (R. 492-495) the title of this action was amended so that there remains but one petitioner, Evelyn Hamburger, in the case.

Among the assets owned by the decedent at her death were 425.817 shares of the common stock of A. Hamburger & Sons, Inc., and 104.167 shares of the common stock of Hamburger Realty Company. (R. 37.)

The petitioners returned the value of decedents shares in A. Hamburger & Sons, Inc., at \$983.35 per share. The respondent, in his notice of deficiency, valued the shares at \$1,200 per share. The petitioners returned the value of the shares of the Hamburger Realty Company at \$2,113.55 per share. The respondent, in his deficiency notice, valued the shares at \$4,850 per share. At the oral hearing the respondent announced that the testimony would not sustain the valuations set forth in the deficiency notice but would sustain a valuation of \$4,000 per share for the Hamburger Realty Company stock. However, in his brief below the respondent contended for a valuation of \$3,900 per share for the Hamburger Realty Company stock and \$1,000 per share for the A. Hamburger & Sons, Inc., stock. (R. 37.)

Petitioners filed an amended petition in which they claimed the Hamburger Realty Company stock was worth \$1,300 per share and the A. Hamburger & Sons, Inc., stock was worth but \$300 per share and, on this amended valuation, asked for a judgment for overpayment of taxes. (R. 37.)

A. Hamburger & Sons, Inc., a California corporation, had issued and outstanding 3,774.183 shares of common stock of a par value of \$1,000 each. (R. 37.)

The Hamburger Realty Company, a California cor-

poration, had issued and outstanding 1,000 shares of common stock of \$1,000 par value. Neither of these companies had any stock of any other character than the common stock referred to nor had they issued any bonds. (R. 38.)

The stock of the Hamburger Realty Company on the basic date was owned as follows (R. 38):

104.167 shares by petitioners herein;

104.167 shares by Evelyn Hamburger;

104.167 shares by Jennie H. Marx, or by a trust created by her;

291.666 shares by David A. Hamburger Corporation;

291.666 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased;

104.167 shares by A. Hamburger & Sons, Inc.

The stock of A. Hamburger & Sons, Inc., on the basic date was owned as follows (R. 38):

425.817 shares by petitioners herein;

425.817 shares by Evelyn Hamburger;

425.817 shares by Jennie H. Marx, or by a Trust created by her;

1,248.366 shares by David A. Hamburger Corporation;

1,248.366 shares by David A. Hamburger as Trustee of the Estate of M. A. Hamburger, deceased.

All of the parties named in the two paragraphs immediately preceding this paragraph are brothers and sisters. (R. 39.)

No shares of stock of Hamburger Realty Company or of A. Hamburger & Sons, Inc., have ever been sold and each of the corporations is a closed family corporation. (R. 39.)

On the basic date the president, general and executive manager of the corporations was David A. Hamburger, aged 84 years. The vice-president of the corporations on the basic date was Evelyn Hamburger, aged 72 years. The secretary-treasurer of the corporations was P. L. Nathan, aged 76 years. Jennie H. Marx was 81 years of age on the basic date. (R. 39.)

The assets, liabilities and net worth of the Hamburger Realty Company on the basic date and the book value (Column A) and the fair market value (Column B) thereof are as follows (R. 39-41):

	Column A Book value	Column B Fair Market value
ASSETS		
A. Cash on hand \$10,720.74 and Accounts Receivable \$145.96.....	\$10,866.70	\$10,866.70
B. Stocks:		
1. 275 shares Farmers & Merchants National Bank of Los Angeles, Calif.....	71,234.00	106,700.00
2. 678 shares Security-First National Bank of Los Angeles, California.....	31,477.50	32,967.75
3. 140 units Security Company.....	None	4,340.00
4. 10 shares Wells Fargo Bank & Trust Company.....	1,885.00	2,925.00
5. 500 shares Angeles Hospital Association.....	350.00	350.00
6. 13 shares Retail Merchants Credit Association.....	1,285.00	1,285.00
C. Real Estate:		
1. W. 8th, Broadway & Hill Sts., property under lease to A. Hamburger & Sons, Inc., and May Company.....	1,185,421.44	4,000,000.00
2. No. 845 South Broadway property.....	101,107.46	315,600.00
3. 36/144 interest S. W. Cor. 15th & Hill.....	19,164.78	3,600.00
4. 2/10th interest N. E. Cor. 14th Place & Hill.....	13,205.88	2,000.00
5. 6/30th interest S. E. Cor. 14th & Hill Sts.....	6,880.38	1,400.00
6. 1/2 interest N. E. Cor. 15th & Hill Sts.....	51,433.30	6,000.00
7. Vallejo, Solano County property.....	None	None
8. 1404 South Hill St.....	26,692.26	5,000.00
9. 149 W. 14th Place.....	39,937.31	6,000.00
10. 1318/22 South Hill St.....	74,111.35	5,800.00

	Column A Book value	Column B Fair Market value
C. Real Estate—Continued		
11. S. W. Cor. 15th & Hill Sts.....	\$60,398.50	\$6,000.00
12. Temple Street property.....	10,589.35	3,500.00
13. 14th Place & S. Broadway.....	26,622.61	3,500.00
14. S. E. Cor. 10th & Main Streets.....	200,006.40	30,000.00
15. S. E. Cor. Ezra St. & Pico Blvd.....	2,468.82	500.00
16. W. 15th btn. Hill & Olive Sts.....	5,228.32	3,000.00
D. Office Furniture & Fixtures.....	None	100.00
E. Prepaid taxes and insurance.....	6,547.82	6,547.80
F. Sales Contract—Leroy Joseph.....	250.00	250.00
Total Assets	1,947,164.18	4,557,632.27
LIABILITIES		
A. Accounts Payable.....	6,391.90	6,391.90
B. Federal income and excess profits taxes.....	70,116.03	70,116.03
C. Note due A. Hamburger & Sons, Inc.....	548,220.70	548,220.70
D. Lease rental deposits from lessees.....	5,750.00	5,750.00
Total Liabilities	630,478.63	630,478.63
Net Worth	1,316,685.45	3,927,153.64

The profit and loss statements of Hamburger Realty Company for the years beginning 1936 to and including the year 1943 are as follows (R. 41-42) :

Year			
1936	Receipts.....	\$282,839.06	
	Expenses.....	85,805.39	
		197,033.67	
	Federal Income Tax.....	27,936.41	
			\$169,097.26
1937	Receipts.....	285,569.43	
	Expenses.....	80,345.72	
		205,223.71	
	Federal Income Tax.....	28,709.47	
			176,514.24
1938	Receipts.....	291,041.44	
	Expenses.....	82,874.28	
		208,167.16	
	Federal Income Tax.....	33,629.85	
			174,537.31
1939	Receipts.....	293,643.30	
	Expenses.....	80,615.30	
		213,028.00	
	Federal Income Tax.....	34,694.30	
			178,333.70

Year			
1940	Receipts.....	\$272, 540. 06	
	Expenses.....	77, 613. 33	
		<hr/>	
		194, 926. 73	
	Federal Income Tax.....	45, 319. 37	
		<hr/>	\$149, 607. 36
1941	Receipts.....	294, 825. 72	
	Expenses.....	73, 272. 94	
		<hr/>	
		221, 552. 78	
	Federal Income Tax.....	70, 116. 03	
		<hr/>	151, 436. 75
1942	Receipts.....	293, 138. 32	
	Expenses.....	73, 447. 84	
		<hr/>	
		219, 690. 48	
	Federal Income Tax.....	92, 035. 28	
		<hr/>	127, 655. 20
1943	Receipts.....	340, 321. 88	
	Expenses.....	93, 711. 28	
		<hr/>	
		246, 610. 60	
	Federal Income Tax.....	116, 529. 99	
		<hr/>	130, 080. 61

Dividends paid by Hamburger Realty Company for years beginning 1936 to and including the year 1943 are as follows (R. 42-43):

Year		
1936—January 6.....		\$183, 082. 14
1937—January 7.....		171, 769. 75
1938—January 7.....		176, 514. 24
February 17.....		1, 091. 32
1939—February 7.....		174, 537. 31
December 13.....		9, 571. 18
1940—February 8.....		176, 260. 91
March 7.....		2, 072. 79
1941—January 15.....		149, 607. 36
1942—March 12.....		151, 436. 75
1943—March 15.....		129, 160. 76

The assets, liabilities, and net worth of the A. Hamburger & Sons, Inc., on the basic date and the book

value (Column A) and the fair market value (Column B) thereof are as follows (R. 43-47):

	Column A Book Value	Column B Fair Market Value
ASSETS		
A. Cash on hand and in banks.....	\$113,706.56	\$113,706.56
B. U. S. Treasury Bonds & Certificates:		
1. \$141,500 P. V. Series 1945-7 2¾%.....	139,139.06	152,245.15
Interest.....	1,134.95	302.67
2. \$100 P. V. Series 1955-60 2⅞%.....	98.50	111.41
Interest.....	.84	.22
3. \$122,000 P. V. Series 1955-60 2⅞%.....	120,633.84	135,915.63
Interest.....	730.73	272.79
4. \$126,150 P. V. Series 1943-45 3¼%.....	124,272.81	133,324.78
Interest.....	854.15	2,027.10
5. \$84,100 P. V. Series 1944-46 3¼%.....	82,841.87	89,776.75
Interest.....	569.43	1,351.40
6. \$100 P. V. Series 1944-46 3¼%.....	100.00	106.75
Interest.....	.68	1.61
7. \$150,000 P. V. Series 1947-52 4¼%.....	168,187.50	177,000.00
Interest.....	1,436.54	3,152.10
C. Notes Receivable of S. W. Levenson.....	1,500.00	1,500.00
Interest.....	11.25	None
D. Mortgages & Trust Deeds:		
1. Estate of Bella A. H. Nathan.....	55,797.61	55,797.61
Interest.....	None	None
2. Armenian Gethsemane Church.....	3,000.00	3,000.00
Interest.....	52.50	20.00
E. Bonds:		
1. \$100,000 P. V. L. A. City High School District 4¾% 3/1 and 9/1.....	103,815.22	103,815.22
Interest.....	1,583.33	554.10
2. \$3,100 P. V. Calif. Country Club 7% 5/1 and 11/1.....	3,050.00	3,050.00
Interest.....	None	None
F. Stocks:		
1. 20 shares American Tel. & Tel.....	2,105.00	3,057.50
2. 1,167 shares Texas Corporation.....	35,933.88	47,409.38
3. 1,505 shares Union Oil Co. of Calif.....	25,812.50	22,575.00
4. 400 shares Inglewood Park Cemetery.....	16,000.00	30,000.00
5. 1,000 shares Standard Oil Co. of Calif.....	41,375.00	23,000.00
G. Real Estate:		
1. 955 S. Alvarado, Acacia Arms.....	44,798.22	30,000.00
2. 421 East 7th Street, Stadler Hotel.....	81,520.78	65,000.00
3. 5320 Olympic Blvd., Meadowbrook Apts.....	55,345.66	25,000.00
4. 3123-9 Sunset Blvd., Westerly Terrace.....	33,175.20	17,500.00
5. 420 N. Coronado Street.....	20,644.63	15,000.00
6. 440 N. Coronado Street.....	20,111.59	15,000.00
7. 2311 Nottingham Street.....	23,959.68	16,500.00
8. 1034-40 W. Temple Street.....	15,695.49	13,500.00
9. N. E. Cor. Santa Monica & Serrano.....	51,636.53	25,000.00
10. 21 Avenue 26, Venice, California.....	3,703.76	2,500.00
11. 4500/10 Santa Monica Blvd.....	30,005.61	15,000.00
12. 901 Exposition Blvd.....	30,902.37	27,500.00
13. 932 S. Mariposa Street.....	20,313.74	15,000.00
14. 2418/22 Brooklyn Street.....	20,655.87	18,750.00
15. S. E. Cor. 90th & Broadway.....	10,502.04	9,500.00

	Column A Book value	Column B Fair Market value
G. Real Estate—Continued		
16. Cor. Jefferson & Grand, Warehouse.....	\$179,675.79	\$300,000.00
17. 2165/9 West Washington St.....	25,461.25	15,000.00
18. 423 S. Western Avenue.....	53,254.60	18,000.00
19. 5425 Santa Monica Blvd. Flomar Apts.....	63,261.33	50,000.00
20. 1627 Ingraham St.....	32,639.24	25,000.00
21. 3800 S. Vermont Avenue.....	52,443.06	43,500.00
22. 1245 W. 49th Street.....	3,891.05	2,750.00
23. S. E. Cor. Clinton & Madison Streets.....	19,559.78	5,000.00
24. Lot 12 and part Lot 5, Sec. 18 Twp. 2, R. 2, W., Riverside County (8,059/10,000ths Interest).....	1,227.29	500.00
25. 8/30th interest 1402 S. Hill Street.....	15,099.43	1,850.00
26. 2/10th interest N. E. Cor. 14th Place and Hill St.....	11,113.71	2,000.00
27. 5/144th interest S. W. Cor. 15th and Hill Sts.....	3,022.72	425.00
28. 1/2 interest N. E. Cor. 15th & Hills Sts.....	48,318.71	6,000.00
29. 1235 S. Hill Street.....	47,933.87	6,400.00
H. 104.167 shares Hamburger Realty Co.....	382,525.73	406,251.30
I. Due from affiliated corporations:		
1. David A. Hamburger Corporation at 2% (1/1/38).....	560,000.00	420,000.00
Interest.....	6,096.49	1,026.76
2. David A. Hamburger Corporation at 2% (12/13/39).....	12,000.00	12,000.00
Interest.....	259.00	80.00
3. Hamburger Realty Co. 2% (12/31/40).....	548,220.70	548,220.70
Interest.....	None	None
4. David A. Hamburger Corporation—open account.....	161,299.29	161,299.29
J. Due from Officers and Stockholders:		
1. Evelyn Hamburger \$74,052.60 & \$3,988.64.....	102,725.44	78,041.24
2. Estate of Belle A. H. Nathan \$49,520.89 and \$11,209.29.....	77,237.14	60,730.18
3. Jennie H. Marx—\$113,174.55.....	150,899.40	113,174.55
4. Estate of M. A. Hamburger—\$409,186.14.....	409,186.14	409,186.14
Interest.....	1,977.70	2,341.36
K. Open Accounts—Stockholders:		
1. Evelyn Hamburger.....	94,972.06	94,972.06
2. Jennie H. Marx.....	94,502.53	94,502.53
3. Estate of M. A. Hamburger.....	87,504.20	87,504.20
4. Estate of Belle A. H. Nathan.....	45,560.83	45,560.83
L. Prepaid taxes, prepaid insurance and prepaid rent commissions.....	11,744.01	11,744.01
Total Assets.....	4,810,357.31	4,436,883.88
LIABILITIES		
A. Current Liabilities.....	444,244.98	444,244.98
B. Federal Income and Excess Profits Taxes.....	96,489.07	96,489.07
C. Lease rental deposits from lessees.....	14,382.50	14,382.50
Total Liabilities.....	555,116.55	555,116.55
Net Worth.....	4,255,240.76	3,881,767.33

Under the terms of the lease between A. Hamburger & Sons, Inc., and The May Department Stores Company dated March 30, 1923, A. Hamburger & Sons, Inc., was entitled to receive, during the period commencing November 1, 1941, and ended December

31, 1942, the sum of \$604,078.16 and during this same period A. Hamburger & Sons, Inc., was obligated to pay to the Hamburger Realty Company as rental for the same property the sum of \$291,666.66. The excess of the amount that A. Hamburger & Sons, Inc., was entitled to received from The May Department Stores Company over and above the amount A. Hamburger & Sons was required to pay to the Hamburger Realty Company during the period commencing November 1, 1941, and ended December 31, 1942, was \$312,411.49 which, when discounted at six percent (.9433) to the date of receipt, had a value at October 13, 1941, of \$294,697.77, and, when discounted at seven percent to the date of receipt had a value at October 13, 1941, of \$279,218.75. This sum is not, nor is any portion thereof, carried as an asset, and is not reflected in the above balance sheet. (R. 47-48.)

The profit and loss statements of A. Hamburger & Sons, Inc., for the year beginning 1936 to and including the year 1943 are as follows (R. 48-49):

Year			
1936	Receipts.....	\$397, 685. 74	
	Expenses.....	59, 928. 64	
		<hr/>	
		337, 757. 10	
	Federal Income Tax.....	41, 360. 14	
		<hr/>	\$296, 396. 96
1937	Receipts.....	445, 422. 81	
	Expenses.....	66, 986. 65	
		<hr/>	
		378, 436. 16	
	Federal Income Tax.....	44, 051. 15	
		<hr/>	334, 385. 01
1938	Receipts.....	416, 682. 57	
	Expenses.....	60, 718. 16	
		<hr/>	
		355, 964. 41	
	Federal Income Tax.....	50, 694. 87	
		<hr/>	305, 269. 54

Year			
1939	Receipts.....	\$416, 551. 04	
	Expenses.....	62, 180. 38	
		<hr/>	
		354, 370. 66	
	Federal Income Tax.....	50, 511. 86	
		<hr/>	\$303, 858. 80
1940	Receipts.....	406, 941. 05	
	Expenses.....	60, 936. 33	
		<hr/>	
		346, 004. 72	
	Federal Income Tax.....	71, 493. 34	
		<hr/>	274, 511. 38
1941	Receipts.....	410, 128. 89	
	Expenses.....	62, 116. 66	
		<hr/>	
		348, 012. 23	
	Federal Income Tax.....	96, 489. 07	
		<hr/>	251, 523. 16
1942	Receipts.....	417, 465. 74	
	Expenses.....	60, 998. 51	
		<hr/>	
		356, 467. 23	
	Federal Income Tax.....	135, 911. 53	
		<hr/>	220, 555. 70
1943	Receipts.....	154, 476. 52	
	Expenses.....	53, 730. 81	
		<hr/>	
		100, 745. 71	
	Federal Income Tax.....	26, 108. 48	
		<hr/>	74, 637. 23

Dividends paid by A. Hamburger & Sons, Inc., for years beginning 1936 to and including the year 1943 are as follows (R. 49-50) :

1936—March 24.....	\$295, 912. 43
1937—January 7.....	262, 478. 08
January 27.....	50, 734. 00
December 29.....	6, 350. 00
1938—January 7.....	276, 997. 91
February 17.....	41, 615. 44
1939—February 7.....	305, 269. 54
1940—February 8.....	300, 579. 11
March 7.....	3, 946. 97
1941—January 15.....	274, 511. 38
1942—March 12.....	251, 523. 16
1943—March 15.....	222, 687. 57

On the 30th day of March, 1923, there was in existence a lease from the Hamburger Realty Company to A. Hamburger & Sons, Inc., for the property situated at Broadway, Eighth, and Hill Streets, Los Angeles, California, which lease terminated on December 31, 1942, and which lease provided for an annual rental of \$250,000 payable by A. Hamburger & Sons, Inc., to Hamburger Realty Company. (R. 50.)

On the 30th day of March, 1923, A. Hamburger & Sons, Inc., subleased the property situated at Broadway, Eighth and Hill Streets, Los Angeles, California, to The May Department Stores Company for a term of twenty years, terminating December 31, 1942, for a total rental of \$10,355,625.60 payable \$43,148.44 per month. (R. 50.)

On the 30th day of March, 1923, Hamburger Realty Company leased the property situated at Broadway, Eighth and Hill Streets, Los Angeles, California, to The May Department Stores Company for a term of thirty years commencing January 1, 1943, and terminating December 31, 1972, for a total rental of \$9,000,000, payable \$25,000 per month beginning January 1, 1943. (R. 50.)

The May Department Stores Company is a reputable department store organization in good standing and a purchaser or owner of the shares of stock here in issue would not have been unduly alarmed as to the receipt of the rentals provided for. (R. 50-51.)

The leases referred to in the findings did not provide for the lessee carrying full coverage insurance against such hazards as fire, lightning, explosion,

flood and water, earthquake, and other like hazards, for the protection of the lessors, and the cost of such full coverage insurance would have been \$10,487.38 for the first forty-five years of the leases and \$20,395.78 for the last five years of the leases. (R. 51.)

For several years prior to the basic date David A. Hamburger, president, general and executive manager of Hamburger Realty Company and A. Hamburger & Sons, Inc., had been ill and almost continuously confined to his bed. (R. 51.)

On or about the basic date and for some time prior thereto P. L. Nathan, secretary-treasurer of Hamburger Realty Company and A. Hamburger & Sons, Inc., was and had been in poor physical condition and showing signs of senility. (R. 51.)

Neither Evelyn Hamburger nor Jennie H. Marx prior to the basic date had any business experience. (R. 51.)

The children of David A. Hamburger are Catherine F. Hamburger, Florence H. Becker, Arthur Hamburger, and Howard Hamburger. None of the children of David A. Hamburger has had any experience in business and, except possibly for one of the daughters, had never held any position in either Hamburger Realty Company or A. Hamburger & Sons, Inc. (R. 51.)

The management on the basic date had not trained or attempted to train any younger people to take over the management or operation of either Hamburger Realty Company or A. Hamburger & Sons, Inc. (R. 52.)

For many years prior to and subsequent to the

basic date there were sever inharmonious relations existing between the stockholders and directors of Hamburger Realty Company and A. Hamburger & Sons, Inc.; David A. Hamburger did not speak to P. L. Nathan or Evelyn Hamburger or Jennie Marx and the latter three did not speak to David A. Hamburger; each of these persons had his or her own separate attorney advising him or her in connection with the affairs of the corporations. (R. 52.)

The inharmonious relations referred to seriously affected adversely the formation of any business or financial or investment policy of either corporation, to the end that such policies remained in status quo and stagnated. (R. 52.)

The shares of stock of each of the corporations on the basic date were not attractive to banks as security for a loan. (R. 52.)

The stockholders regularly each year, pursuant to an agreement, anticipated the earnings of the A. Hamburger & Sons, Inc., for the year and borrowed all of the earnings during such current year, leaving no earnings in the business for corporate operations. (R. 52.)

The stockholder members of the Hamburger family, by reason of being stockholders, had other advantages, such as borrowing money at a low rate of interest and from sources through the corporation, whereas, they could not have borrowed it from other sources on the same collateral. This advantage would not necessarily have been available to the purchaser of the

minority interests in the corporations here involved. (R. 52-53.)

The fair market value of the property located at Broadway, Eighth and Hill Streets, Los Angeles, California, and subject to the leases from Hamburger Realty Company to The May Department Stores Company was arrived at by giving effect to the lease and the lease rentals discounted on a seven percent basis and adding the residual value of the property. (R. 53.)

On the basic date 131 shares of the common stock of A. Hamburger & Sons, Inc., owned by decedent herein at the time of her death, were pledged to the corporation to secure an indebtedness of \$85,817.14 owing by the decedent to the corporation and evidenced by two promissory notes, one in the amount of \$66,027.85 and one in the amount of \$19,789.29, the notes bearing date of January 1, 1938, and being renewal notes of earlier dated notes. (R. 53.)

The fair market value of the 104.167 shares of common stock of the Hamburger Realty Company on October 13, 1941, was \$3,900 per share. The fair market value of the 425.817 shares of the common stock of A. Hamburger & Sons, Inc., on October 13, 1941, was \$1,000 per share. (R. 53.)

SUMMARY OF ARGUMENT

The Tax Court did not err here in determining that the value of the Hamburger Realty Company stock was \$3,900 per share on the critical date, and that of A. Hamburger & Sons, Inc., \$1,000. The problem is

really one of weighing the evidence, and that of course is not the function of a court of review.

There is no merit to petitioner's contention that the Tax Court contravened the controlling Regulations which prescribe the factors to be considered in evaluating stock, by "ignoring" certain of them which petitioner herself thinks highly important. Those factors were not passed over; the Tax Court's opinion clearly shows that they were not. All that happened here was that the court below considered that the criteria stressed by petitioner's expert witnesses were of less value as guide-posts in the particular circumstances of this case, than were those on which the Government's expert witness based the evaluation which the Tax Court adopted.

ARGUMENT

The Tax Court correctly evaluated the two stocks here in question

This Court has many times declared that the value of property for tax purposes presents peculiarly a question of fact, and that the findings of the Tax Court on the subject will not be disturbed if there is support for them in the record. *Zanuck v. Commissioner*, 149 F. 2d 714; *Kinney's Estate v. Commissioner*, 80 F. 2d 568; *Old Mission Cement Co. v. Commissioner*, 69 F. 2d 676, affirmed on another point, 293 U. S. 289. See also *Roth v. Wardell*, 77 F. 2d 124. We think there is ample such substantiation for the decision below; indeed we submit that petitioner's complaint, although in terms charging the Tax Court with having failed to "consider" (Br. 15) certain

evaluation factors which petitioner urged upon it, is in reality nothing more than a condemnation of the Tax Court, for having failed to *accept* those criteria as being in this instance determinative, and to reach conclusions favorable to petitioner accordingly. In effect, petitioner is now importuning this Court to reweigh the evidence; and that, of course, is not the function of judicial review. *Webre Steib Co. v. Commissioner*, 324 U. S. 164; *Commissioner v. Scottish American Co.*, 323 U. S. 119; *Zanuck v. Commissioner*, *supra*.

We agree with petitioner that the case is governed by Section 81.10 of Treasury Regulations 105 (Appendix, *infra*), which section in pertinent substance provides that in the case of nonlisted stocks on which no bid and asked prices are available, value is to be determined on the basis of the corporation's net worth, earning power, dividend-paying capacity, and other relevant factors. We agree, too, that all of these factors are to be "considered"; but that does not mean, we submit, that the evaluator may not exercise his judgment in deciding among comparative "relevancies", or that he may not select as finally determinative such of these criteria as seems to him best to fit the particular case. Assuredly, no other rule would be workable. For example, we think it borders on the obvious that in ascertaining the value of stock in a corporation which unlike the one at bar, as we shall see, is strictly a personal service company, "net worth" would be rationally of scant aid whereas "earning power" would there logically assume com-

elling significance. Yet the petitioner at bar, in her apparent insistence upon equal force being accorded to all factors named in the Regulations, must inevitably take the position that, in the hypothetical case just stated, earning power should weigh no more heavily than should net worth.

We certainly find no decisional authority for a proposition of that kind. Indeed, good authority can be found which, in the given case, placed main emphasis on almost every one of the various factors which the Regulations state are to be taken into consideration in reaching a conclusion as to value, although as is to be expected chief reliance is ordinarily placed on earning capacity or on the worth of underlying assets, or on both of those criteria together.² The "choice" of the determinative factor or factors must necessarily be governed by the particular circumstances confronting the evaluator; even the "reasonable man" of torts law fame does not operate in a vacuum, but rather in the setting wherein he is placed.

And so it was with the Tax Court in this instance. It was faced here with an unusual corporate set-up, and with circumstances which certainly could not be considered either "average" or "ordinary". Hence

² See and cf.: *Old Mission Cement Co. v. Commissioner*, *supra*; *Stiles v. Commissioner*, 69 F. 2d 951 (C. C. A. 5th); *Wells Amusement Co. v. Commissioner*, 70 F. 2d 208 (C. C. A. 4th); *White & Wells Co. v. Commissioner*, 50 F. 2d 120 (C. C. A. 2d); *Griffiths v. Commissioner*, 70 F. 2d 946 (C. C. A. 7th); *Phillips v. United States*, 12 F. 2d 598 (W. D. Pa.), reversed on other grounds, 24 F. 2d 195 (C. C. A. 3d).

the court was entirely justified, we believe, in applying to the problem of valuing these stocks the criteria which seemed to it to be most warranted by the peculiar facts of the case. The court was also justified correlatively, we submit, in relegating to the background, as being in its view unreliable indicia of value under the facts, those certain other criteria which the petitioner was stressing in support of her own valuation figures.

As a matter of fact, the petitioner's own witnesses did not "consider", in giving their opinions here, all of the bases named in the Regulations for determining value; they chose largely to ignore every factor except the earnings, past and theoretically potential, of the two corporations.³ And we think, as apparently did the Tax Court, that such stress upon earnings fell far wide the mark of revealing the true value of the securities in question. In the first place, where the value of capital stock is to be ascertained by regarding the earnings of a corporation as the principal factor, it certainly should precedently appear that such earnings are really representative of the company's earning capacity. This entails giving due consideration to such matters as whether the corporation is actively engaged in business with a true motive to obtain all possible profit from available resources, or whether it is primarily engaged in

³ The two principal witnesses for petitioner were Messrs. Eitner and Walker, both of whom testified as experts on valuation. Their testimony appears respectively at pp. 120 *et seq.* and pp. 167 *et seq.* of the Record.

acting as a depository and guardian for the wealth of its stockholders. It entails also inquiring into whether the corporation uses its assets for self-benefit or whether the transactions in which it engages chiefly further, and are purported to further, the private concerns of its shareholders or other persons. In the case now before us, certainly it is clear that the two corporations concerned were much more in the nature of "holding companies" for the Hamburger family funds than they were of true business ventures. It is likewise clear that such intra-corporate transactions as those in which A. Hamburger & Sons, Inc., habitually loaned large sums of money to its stockholders, and to other corporations in which the stockholders had an interest, at abnormally low rates of interest (R. 55), created a condition where the economic benefits of the corporate assets did not go into normal corporate channels but were transferred in large part to others. We submit that this evidence of so artificial a shifting of profits made the corporate earnings nearly useless as a criterion for determining the value of the A. Hamburger & Sons, Inc., shareholdings.

Moreover, both of the petitioner's chief witnesses fixed their earnings-capitalization rate on the assumption that the "willing buyer" of the Regulations would expect a rate of return here comparable with corporations engaged in what were distinctly non-comparable businesses. Thus, they used as presumably "representative", such stocks as American Telephone and Telegraph Company, Pacific Gas and Electric

Company, Consolidated Edison, International Harvester, Standard Oil of California, Chesapeake & Ohio Railroad, Union Pacific Railroad, etc.; and it was on the basis of the average yield of those stocks that the witnesses determined that a buyer would only be "willing" here at a purchase price which would yield a similar rate of return.⁴ The witnesses seemed quite to lose sight of the fact that this was a family corporation, the primary purpose of which was not to produce wealth in the manner that the ordinary industrial concern may be said to produce it, but rather to preserve capital and to collect and distribute whatever increment might accrue on that capital. Admittedly, in the case of a manufacturing corporation or of a public utility, the record of annual earnings is ordinarily of prime importance, but that is because the value of the stock results chiefly from the success of the company in producing profits. The depreciated machinery and equipment employed in the operation of a public utility, for instance, may have little intrinsic worth except to the particular owner; and if the operations of that owner are discontinued, it is even conceivable that the physical assets may be scrapped at junk value. On the other hand in the case of personal holding companies, the value of the assets is not normally dependent upon the operations of the owner, nor otherwise identifiable with him. Such value is ordinarily created and maintained by general economic conditions, and from appreciations in market value having nothing to do

⁴ E. g., R. 133, 136, 143, 151-152, 175-176.

with the owner's activities. In such companies the value of the underlying assets would seem, we submit, to be the soundest basis for judgment on the value of the corporate stock.

There were other weaknesses in petitioner's witnesses' testimony which seem to us patent. Thus it was attempted to discount the value of the shares of both A. Hamburger & Sons, Inc., and Hamburger Realty because it was said that they lacked liquidity. (R. 142.) But here again, while ordinarily inability to realize immediately upon an asset undoubtedly does detract from its value, the weight to be given this feature is surely largely dependent upon the owner's contemplated use of the property; in a case where the stockholder has no particular interest in disposing of his shares as a ~~speculator~~ might, but intends rather to hold them for investment quite irrespective of general market trends, the feature of liquidity may be insignificant when contrasted, for instance, with the feature of security. The decedent in this case, for example, was an elderly woman and a wealthy one; quite clearly in her mind the feature of safety would have dominated over liquidity in determining the price at which she would have parted with any of her investments.

The record in the instant case makes plain that there inhered in the stocks we are now discussing a very high degree of security indeed. The Hamburger Realty Company owned, as its principal asset, a building which was bound to produce rentals totaling \$9,000,000 over a future thirty-year period. A. Ham-

burger & Sons, Inc., had \$640,000 in United States Treasury bonds and certificates, approximately \$400,000 in cash, stock, and bonds, and nearly \$800,000 worth of real estate. (R. 385-388.) Certainly there would be many prospective buyers "willing" to forego the ^{H.H.H.} ~~right~~ rate of yield produced by the securities used as "comparable" by petitioner's witnesses in order to obtain the gilt-edge quality of investment offered in the stocks of the two corporations here under discussion. Accordingly, we submit, the attempt of petitioner's witnesses to discount the value of these stocks by reason of their lack of ready market really avails her case nothing.⁵

Furthermore, as we have mentioned earlier in this discussion, the stockholders of A. Hamburger & Sons, Inc., enjoyed special privileges as such, assuredly not open to the shareholders in many corporations; and that these privileges were of considerable value goes almost without saying. We are referring now to the fact that approximately two million dollars of the corporate assets of that company were loaned to its shareholders or to corporations in which they were interested, some at a two percent rate of interest and some at no interest at all. (R. 385, 388.) The corporation, for example, held a mortgage and trust deed on the

⁵ This feature of security may well have tended also to offset, in the mind of the fact-trier, such "discount" factors as, for example, the probability of increased income tax and the trend of economic conditions on the critical date. See Br. 29-31. Cf. *Zanuch v. Commissioner, supra*, where the imminence of war was urged by the taxpayer as tending to show that the stock exchange quotation did not truly represent fair market value.

estate of the decedent herein to secure some \$55,000, on which loan no interest was apparently being charged. (R. 385.) Most assuredly, a prospective seller would attach considerable value to this rare borrowing privilege in determining the price at which he would sell; and of course we are just as much interested here in the price that a "willing" seller would ask as we are in the price a "willing" buyer would pay. This ability to borrow large sums at very low rates was one of the bundle of rights which a seller would be giving up on the sale of his stock, and its loss would unquestionably be reflected in the price at which buyer and seller would meet. ~~And~~ ^{Certainly} it cannot be presumed that the American Telephone and Telegraph Company or the Pacific Gas and Electric Company, or any of the other corporations used by the petitioner's witnesses for the purpose of establishing the yield that a "willing" purchaser would expect, would loan any substantial sums to its stockholders at such low rates of interest. And that this factor was much in the mind of the fact-trier here is seen in the opinion below, where the Tax Court in another context said (R. 58):

* * * since the management of A. Hamburger & Sons, Inc., have intentionally created a falsely low income by enriching themselves and their other stockholders through interest-free loans, it is held that the incomes of these companies have already received all of the consideration possible in arriving at the evaluation of the stock * * *.

See also R. 52-53.

The petitioner complains too (Br. 18) that the "condition of the management" was not sufficiently considered. By this we assume she means that the Tax Court apparently did not think that the value of the stock should be discounted because of the fact that the stockholders (among whom was the management) friendly terms with each other. Neither do *we* think, were all well past middle age and on exceedingly un- however, that these circumstances were entitled to any great weight. In the first place, the warring shareholders were all represented by attorneys and advisers, presumably capable. (R. 52.) And while the Tax Court found (R. 52) that the inharmonious relations between the stockholders seriously and adversely affected the formation of any business policy of either corporation with the result that such policies remained in *status quo*, that does not seem to us of much consequence in view of the character of the corporations' "business". The management requirements in connection with functions consisting merely of collecting rents, etc., and distributing income to stockholders are obviously practically nil. Add to this too, such facts as that the realty company was assured of a \$300,000 annual income from the building site leased to the May Company department store for thirty years to come—assured regardless of whether the lessor's "management" was young or old, active or inactive, friends or enemies. In all probability nothing short of a national catastrophe would prevent the May Company from fulfilling the terms of the lease; and there was like stability in the income from the realty company's other holdings, both real and personal.

In fact, adopting for the moment the approach of petitioner's witnesses to the problem, and considering the past earnings of the realty company together with other known facts on which to project the estimated corporate income over the future years—but without quite the pessimism that Messrs. Eitner and Walker entertained on the witness stand—the capitalization of the realty company's reasonably expected earnings results in a value for the stock of that corporation closely approximating the value expressed by the Government's witness, Edward H. Allen. (R. 259.) Taking that company's earnings for the six years beginning with 1936 and continuing through 1941, we find that the total income for this period was \$999,526.62, or an average of \$166,587.77 per year (R. 41-42); and by adding to this the sum of \$50,000 on account of the fact that the realty company was to realize an additional yearly income of \$50,000 from the May Company lease beginning in 1943 (R. 50), the average expected income of the foreseeable future totals \$216,587.77 per year. Capitalizing this at five percent, which would seem to be a reasonable rate considering the character of the corporate "business", gives a value to the company's outstanding stock of \$4,331.76 per share; capitalizing it at six percent so as to give every leeway for "risks," always possible however improbable, gives a value on a per share basis of \$3,609.79.⁶ We submit accordingly that whether the view be taken that the underlying assets

⁶ There were 1,000 shares of common stock outstanding in Hamburger Realty Company. (R. 38.)

should be taken as the most important factor, in line with the Tax Court's view, or whether the earnings record of the realty company be deemed to warrant preeminence, the answer is much the same with respect to Hamburger Realty Company at least, i. e., that that corporation's stock was on the pivotal date worth approximately \$3,900 per share, the figure found by the Tax Court.⁷

But at this juncture we again state our view that the Tax Court would have been gravely misled had it accepted the opinions of petitioner's witnesses that capitalized earnings-rate was the proper basis determinative in evaluating these stocks. Not that the Tax Court ignored the earnings-rate factor; we have just quoted from the opinion below the court's statement that it had given to that factor all the consideration it thought was deserved. And we ask, moreover, by what process of reasoning can it be concluded that in order to fix the value of the stocks of corporations such as these, the evaluator should take into consideration how profitable it is to run railroad

⁷ To be sure, petitioner's witness, Eitner, capitalized the realty company earnings at around ten percent. (R. 151-152, 154-155.) He did so, however, largely on account of what he thought were the undesirable features of the stock (R. 154-155); and certainly, as we have stated, the fact-trier might well have considered such features more than offset in the circumstances of the case by the highly desirable and extraordinary features we have previously mentioned. The logical result of such offset would be to fix the capitalization rate somewhere around six or seven percent, and eight plus a fraction at the most, that being what this same witness stated to be the Dow Jones yield-rate averages on industrials, rails, and utilities, as of the basic date (R. 152), and in view of the fact that he was using such stocks as "comparatives" here.

traffic through Maryland, Ohio, and other eastern states, etc., and to ignore, as petitioner's witness Eitner did, what the corporations' basic asset—real estate—was currently yielding in and about the City of Los Angeles. Eitner was asked whether he had made any inquiry into what rate of return Los Angeles real estate was producing; he replied that he had not, “not believing that to be pertinent in relation to the value of the stock.” (R. 127.) Actually, we think it a fair indictment of both the witnesses offered by petitioner that they were “experts” in reducing the earnings of dissimilar corporations to dollar value—and nothing more. In contrast, the Commissioner's witness, Allen, based his opinion to a considerable extent on the real property values which principally underlay the two stocks, although he certainly did not ignore, any more than did the Tax Court, other factors potentially bearing on the point. (R. 243–246, 259–262.) Allen was a man very familiar with real estate values around Los Angeles, having been engaged in the appraisal of many large and small parcels of realty in that vicinity, and having appraised the stocks of many corporations which held property thereabouts. (R. 238–243.) Based upon those many years of experience, Allen stated that in his opinion the stock of Hamburger Realty Company was worth \$3,900 a share and that of A. Hamburger & Sons, Inc. \$1,000 per share, which are the respective values on which the decision below is rested. (R. 259, 262, 53.)

In short, it seems to us that what the Tax Court did here was to exercise an independent judgment after having given due consideration to both parties' evidence, and with full understanding of the controlling rules of law; and the United States Supreme Court has declared that a Tax Court decision, so reached, is entitled to affirmance. *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

CONCLUSION

The decision of the Tax Court should be affirmed.
Respectfully submitted.

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OCTOBER, 1947.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(j) *Optional Valuation.*—If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.10 *Valuation of property*—(a) *General.*—The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death; or, if the executor elects in accordance with the provisions of section 81.11, it is the fair market value thereof at the date therein prescribed or such value adjusted as therein set forth. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or

to sell. The fair market value of a particular kind of property includible in the gross estate is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the applicable valuation date should be considered in every case.

* * * * *

(c) [as amended by T. D. 5351, 1944 Cum. Bull. 579] *Stocks and bonds*.—The value of stocks and bonds, within the meaning of the Internal Revenue Code, is the fair market value per share or bond on the applicable valuation date.

* * * * *

If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors, and, in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Among such other relevant factors to be considered are the values of securities of corporations engaged in the same or a similar line of business which are listed on an exchange. However, the weight to be accorded such comparisons or any other evidentiary factors considered in the determination of a value depends upon the facts of each case. Complete financial and other data upon which the valuation is based should be submitted with the return.

* * * * *

